

Tariff certified by the Secretary of State under Life Sentences (NI) Order 2001 on 04/01/05

**THE QUEEN v SAMUEL DAVID JOSEPH CUMMINS**

-----

**DECISION ON TARIFF**

-----

**Before Kerr LCJ and Girvan J**

-----

**KERR LCJ**

*Introduction*

[1] On 29 June 2001 the prisoner, Samuel David Joseph Cummins, was found guilty of the murder of Guy Benson Harper on 30 March 2000. Mr Harper was just three days short of his twenty-sixth birthday. At the time the prisoner was aged 21. He is now 25. Girvan J sentenced him to life imprisonment. Leave to appeal was refused by the Court of Appeal on 9 September 2002. The prisoner has been in custody since 13 October 2000.

[2] On 30 June 2004 Girvan J and I sat to hear oral submissions on the tariff to be set under Article 11 of the Life Sentences (NI) Order 2001. The tariff represents the appropriate sentence for retribution and deterrence and is the length of time the prisoner will serve before his case is sent to the Life Sentence Review Commissioners who will assess suitability for release on the basis of risk.

*Factual background*

[3] The facts set out below have been taken from the evidence given on trial and from the contents of statements contained in the committal papers.

[4] At around midnight on the morning of 30 March 2000 the deceased went with a friend to Kelly's Nightclub, Portrush. He was known to the staff of the club and was considered to be an affable and peaceable customer. One staff member described him as "a model patron, a perfect gentleman". At around 2.15am he left the premises in what one witness described as "his usual good form". Outside the club the deceased met up with an acquaintance, Ryan Simmonds, and they started

walking home. As they walked along the Bushmills Road the deceased stopped to relieve himself. Mr Simmonds proceeded a short distance and then turned round to wait for the deceased. He saw a crowd fighting on the road and ran back to see what was happening, but as he reached it he was punched in the face and knocked to the ground by the prisoner. He left the scene and walked home without again seeing the deceased. (The prisoner was prosecuted for the assault on Mr Simmonds and sentenced to 6 months' imprisonment.)

[5] Witnesses observed the deceased in a confrontation with a number of other men. He was seen to be punched to the ground. A taxi driver who passed the affray noticed a number of men taking turns to kick the deceased as he lay on the road. In his statement to the police he said they were kicking very hard, in a "vicious manner...like a pack of animals trying to outdo each other...it was frightening to watch". He then saw the prisoner bend over the deceased, grab him by the hair and, with all his force, smash his face into the road around three times while others continued to kick him. After a brief respite the prisoner is said to have returned to the deceased and stamped "as hard as he could" three times on his head. The witness telephoned the police. He estimated that the assault lasted 3 to 4 minutes. Another witness noticed (in the context of violent assaults by others) the prisoner kick the deceased repeatedly on the head and stamping on it 3 times before kneeling down, grabbing the deceased's hair and banging his head off the road 3 times. A number of witnesses said that the prisoner seemed to be doing the most of the kicking. One said that he continued to kick the deceased for 15 seconds after the others had stopped, and that his blows were to the head while the others kicked the body. Another said that he specifically kept watch on the prisoner as he "was doing more harm to the fella on the ground". After the assault on the deceased the prisoner was then seen to assault Mr Simmonds. A number of witnesses noticed Carrie McClements with the assailants. She was seen trying to stop the assault.

[6] Police officers who arrived at the scene at around 2.30am found that bystanders had moved the deceased to the pavement. They tried to locate a pulse but were unsuccessful. Resuscitation was attempted. An ambulance arrived at 2.34am and further attempts were made to resuscitate the deceased, who was then taken to Coleraine Hospital. Brain stem tests were administered at 4pm on 30 March 2000 when life was formally pronounced extinct. Support systems were removed at 7.20pm. His father formally identified the deceased's body.

[7] A post mortem examination was performed by Professor Jack Crane, State Pathologist, on the morning of Thursday 30 March 2000. Professor Crane concluded that the cause of death was subarachnoid haemorrhage, bruising and oedema of the brain due to blows to the head. The report stated:

"Death was due to a head injury...There were multiple areas of abrasion, some associated with bruising, scattered on the face, particularly on the forehead and cheeks. Further bruising was seen on the upper and

lower eyelids of the left eye and there were lacerations at the outer end of the left eyebrow, on the left cheek and in the lining of the lower lip. The left ear was also bruised and there was a band of abrasion extending from behind the left ear on to the left side of the neck. When the scalp was reflected there was heavy bruising of its undersurface and further bruising beneath the skin of the left side of the face. The underlying skull was intact but there had been bleeding over the brain surface which was superficially bruised in places and had undergone marked reactive swelling. It was ultimately the effects of the brain injury which were responsible for his death in hospital.

The injuries were due to a serious assault. Some of those to the face could have been due to punches but it seems likely that most were probably due to his being kicked or stamped whilst lying on the ground. He had sustained at least one blow to the left side of his head and because injury to this area of the head or neck may be associated with damage to the vertebral artery in the bony spine a detailed examination of the artery was carried out after the autopsy however no leakage from the artery could be identified.

Whilst it seems likely that most of the reactive swelling of the brain was caused by direct trauma to the head it is likely that the brain swelling was contributed to, at least in part, by obstruction of his airway and inhalation of blood consequent on the assault and loss of consciousness. Also there was evidence that he was at least moderately intoxicated at the time of the incident since his blood alcohol concentration at 7am on March 30, was found to be 192mg. Per 100 ml. Since this alcohol intoxication would have exacerbated the effects of the head injury, particularly the brain swelling, and would also have predisposed to airway obstruction and the inhalation of blood, it should be regarded as a contributory factor in his death.

Apart from the head injuries there were no other serious marks of violence. There was an abrasion on the upper part of the back, a little bruising behind the right armpit, bruising and abrasion on the left forearm, a small bruise on the left index finger and a little abrasion on the back of the right elbow. Some of these injuries could have been

sustained in the assault while others might have occurred when he fell or was knocked to the ground.”

[8] At 7.48pm on 30 March 2000 the prisoner was arrested at his family home in Coleraine. When cautioned he replied “No”. In police interview the prisoner stated that the deceased had approached his group and had “slabbered” to him about an earlier altercation involving one of his friends, whereupon one of the others had unsuccessfully hit out and the deceased successfully hit back.<sup>[1]</sup> The deceased then approached the prisoner, tried to hit him, missed, was kicked on the leg by the prisoner and then punched by him whereupon others began to assault the deceased. The prisoner said that the deceased fell to the ground whereupon a number of others “battered” him as he tried to push them off. He told the police that he did not know the men who had assaulted the deceased, but then proceeded to implicate his co-accused. In his second interview the prisoner said that he was almost down on his hands and knees trying to protect the deceased from the attack. He described what he had been drinking and assessed himself as drunk at the material time. The prisoner admitted assaulting Mr Simmonds. He also accepted that he misled police about the footwear he had on at the time of the offence, claiming that he was embarrassed about the poor condition of the shoes that he was actually wearing.

[9] In a later interview police put Carrie McClements’ statement to the prisoner. She had told police that the deceased annoyed the prisoner by putting on an Italian accent. The deceased was said to have approached in a friendly manner. McVicker punched him, but the deceased got the better of him, whereupon the prisoner intervened, put the deceased to the ground, kicked him about the head, lifted his head by the hair and banged it against the road. The prisoner denied the allegations. The police put allegations to the prisoner from his co-accused Colley who also claimed that the prisoner had kicked the deceased, stamped on his head and banged his head against the road. The prisoner retorted that his only involvement on the road was to try to get two of his co-accused, McClements and McVicker, off the deceased. The police then put allegations from the prisoner’s friend and co-accused Denis McClements to the effect that the prisoner had kicked the deceased’s head, which the prisoner denied. The prisoner said that his co-accused were trying to get themselves out of trouble, and alluded to the fact that Miss McClements was romantically linked with another of the accused and was the sister of Denis McClements.

[10] In a further interview the investigating officers put another statement to the prisoner in which he was again described as having become annoyed at the deceased when he spoke in an Italian accent. The statement claimed that the deceased was not being aggressive, but was told to “Fuck away off” by the prisoner and McClements. He continued alongside them, as if wanting to join their company, until the prisoner and two co-accused squared up to him. Colley is said to have rushed at the deceased and punched him, causing him to fall to the ground whereupon the prisoner, McClements, Colley and McVicker kicked and stamped on him. The

prisoner maintained his position of denying that he had assaulted the deceased on the ground.

#### *Antecedents*

[11] The prisoner had one prior conviction for violence, a common assault on an adult, which was dealt with by way of a 12 months probation order at North Antrim Juvenile Court in April 1996. Three burglaries were dealt with at the same court. Post index conviction the prisoner was sentenced to 6 months' imprisonment at North Antrim Magistrates' Court for offences including common assault (3 months), criminal damage and theft all of which were committed prior to the murder. The latter convictions have been left out of account for the tariff fixing exercise.

#### *The NIO papers*

[12] Written representations were received from the deceased's father, mother and sister. Mr Harper referred to his continuing grief and his difficulty in observing his wife's constant grief at the death of their son. He suffered from stress, which provoked physical symptoms, and had difficulty sleeping. At times Mr Harper experienced feelings of hatred for his son's killer and he has had suicidal thoughts. He stated that special family occasions now bring painful memories.

[13] Mrs Harper wrote that she was filled with hatred and anger. She continued to attend her doctor and was on medication, but said that this cannot relieve her pain, heartache, sleepless nights, crying and loneliness. She had nightmares in which she relived the manner of her son's death. Mrs Harper has not been able to return to Church since the funeral, which took place on her son's 26<sup>th</sup> birthday and on Mothering Sunday.

[14] The deceased's sister, Shauna Harper, wrote that she thought of her brother every day and continued to feel grief, hurt and pain. She was haunted by thoughts of how her brother died and felt that these will never resolve. Miss Harper stated that she continued to suffer from bouts of depression, sleeplessness and grief. She wrote that she was particularly upset at special occasions such as weddings and Christenings as her brother never got the opportunity to have such things. Miss Harper misses talking to and sharing experiences with her brother, who was her only sibling. She tries to support her parents through their continuing grief but felt that this was an impossible task.

[15] No written representations have been forthcoming from the prisoner.

#### *Practice Statement*

[16] In *R v McCandless & others* [2004] NICA 1 the Court of Appeal held that the *Practice Statement* issued by Lord Woolf CJ and reported at [2002] 3 All ER 412 should be applied by sentencers in this jurisdiction who were required to fix tariffs

under the 2001 Order. The relevant parts of the *Practice Statement* for the purpose of this case are as follows: -

*“The normal starting point of 12 years*

10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

11. The normal starting point can be reduced because the murder is one where the offender’s culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

*The higher starting point of 15/16 years*

12. The higher starting point will apply to cases where the offender’s culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was ‘professional’ or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

### *Variation of the starting point*

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.

17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty."

### *Conclusions*

[17] It was suggested that this was a case that fell within the normal starting point of twelve years. We do not accept that claim. This was not a quarrel between two people known to each other where there was a sudden loss of control. On the contrary, this was a concerted savage merciless attack on a young man who throughout most of the attack, and certainly when he sustained the fatal injuries, was utterly incapable of offering any defence whatever to the brutal assault on him. The prisoner was the principal perpetrator of the attack and he it was who grasped the hair of the senseless victim and smashed his face into the ground. This gratuitous act alone makes this a case that merits condign punishment. The case is clearly within the higher starting point category but, quite apart from that consideration, it is one where a substantial sentence for the retribution and deterrence aspects of punishment must be imposed. Society expects that its abhorrence of such behaviour is marked with a severe penalty. Furthermore, so that

those who carry out these all too prevalent attacks are aware that they will be dealt with rigorously a strong deterrent element must also be present.

[18] It is conceivable that the prisoner did not intend to kill and that must be taken into account in his favour as must his youth. Other mitigating features are hard to detect. There is certainly no tangible evidence of genuine remorse. The manner in which he met the charge, particularly his attempts to blame his co-accused, give the lie to claims that he is genuinely contrite about the enormous grief that he has inflicted on the family of the deceased or that he has brought about the untimely death of a fine young man.

[19] We have learned that the deceased's father took his own life some time after the trial of the prisoner. We cannot be entirely sure that this was directly and entirely due to the killing of his son but the tenor of the representation that he made (and which we have referred to above) suggests that the two were not unrelated. If so, this dreadful development provides eloquent testimony to the devastation that a wanton act of barbarity such as the prisoner was guilty of can wreak on the lives of those bereaved. Yet, as we have said, the prisoner appears oblivious to the tragedy that he has caused and immune to the feelings of remorse that ought to have preoccupied him since his awful crime.

[20] Taking all these factors into account and having regard to all that has been said on his behalf we consider that the appropriate tariff in this case is fifteen years. This will include the period spent by the prisoner on remand.

---

<sup>11</sup> It is clear that the prisoner's group was involved in an earlier altercation on Kelly's laneway. Those who were involved in the altercation deny having any contact with the deceased either in the laneway or on the Bushmills Road.